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BY ELECTRONIC FILING

September 17, 2020

BC Labour Relations Board
600 - 1066 West Hastings Street
Vancouver, BC V6E 3X1

Attention: Registrar

Dear Sir/Madam:

Re: British Columbia Teachers Federation and the Province of British Columbia (Ministry of Education) and the British Columbia Public School Employers Association - Application pursuant Section 88 to the *Labour Relations Code* re BC's Covid-19 Response in the Public K-12 Education Sector

We represent the applicant British Columbia Teachers' Federation and make this submission pursuant to s. 88 of the *Labour Relations Code* on their behalf.

We have provided electronic copies of our submission to the respondents below, concurrent with filing.

Respondent Government of BC

Ministry of Education
PO Box 9045 Stn Prov Govt
Victoria, BC V8W 9E2

Attn: Honourable Rob Fleming,
Minister of Education
Ph: 250 356-8247
Fax: 250 356-0948
Email: EDUC.Minister@gov.bc.ca

Attn: Scott MacDonald,
Deputy Minister of Education
Fax: 250 953-4985
Email: DM.Education@gov.bc.ca

Respondent BCPSEA

300-2889 East 12th Avenue
Vancouver, BC
V5M 4T5

Attn: Renzo Del Negro,
Chief Executive Officer
Ph: 604 730 4511
Fax: 604.730.0739
Email: renzod@bcpsea.bc.ca

Yours truly,

VICTORY SQUARE LAW OFFICE LLP

per:

Craig Bavis
Professional Law Corporation
/encls.

cc: BCTF/Teri Mooring, President (by email)
cc: BCPSEA/Renzo Del Negro, CEO (renzod@bcpsea.bc.ca)
cc: Ministry of Education/Rob Fleming, Minister & Scott MacDonald, Deputy Minister
(EDUC.Minister@gov.bc.ca)

I. NATURE OF APPLICATION

1. The British Columbia Teachers Federation applies to the Labour Relations Board pursuant to s.88 of the *Labour Relations Code*. The BCTF seeks the assistance of the Board in addressing the serious and growing concerns that teachers have about the working and learning conditions in the public education system during the COVID-19 Pandemic. The Provincial Government, through the Ministry of Education and District Boards of Education with their bargaining agent, the British Columbia Public School Employers Association, have a duty to ensure that schools are safe places to work and learn pursuant to statutory and collective agreement obligations.

II. INTRODUCTION

2. In this unprecedented public health crisis, maintaining an effective and safe public education system is critical for the educational and social development of students and the health of the entire school community which provides education services for the benefit of students and society. While the BCTF voices its concerns from the perspective of workers in the public education sector in this application, the working conditions of teachers have much greater implications beyond those employees because the learning conditions and the structure of our educational system impact families and communities and shape our collective social values.

3. It is now mid-September 2020, just two weeks into the provincial government's K-12 Education Restart Plan, and the BCTF and its local associations have heard from many members who have significant concerns about the inconsistent and inadequate implementation of Government mandated health and safety measures which do not meet the protections promised in the spring and summer.

4. Despite the BCTF urging the Ministry of Education to take the time necessary to develop and implement proper measures to minimize the risk of COVID-19 exposure, schools reopened after Labour Day without the full understanding and knowledge of how these measures would operate. Consequently, there is an extremely high level of confusion among the school Districts about basic safety measures that should have already been put in place. Standards differ between Districts and sometimes conflict with advice previously given or from other agencies.

5. BCTF members are reporting inadequate “layers of protection” and there is a broad concern that the Ministry of Education is not properly enforcing the required health and safety measures. Many Districts in turn have followed that pattern. BCPSEA is not providing clear directives to the District employers and nor is it directing adequate enforcement.

6. Teachers report that they are feeling pressured to work in unsafe conditions and are demanding significant changes to ensure they and their students are protected. The lack of clarity and constantly shifting messages from the government is exploiting teachers’ professionalism, their high expectations of themselves and their caring for students. Teachers want to provide the very best education possible under these pandemic conditions, but the health and safety concerns are only growing with each day that BCTF members spend at their worksites. The present labour relations framework, structured around the legalistic and formal grievance and arbitration process, is not suited for circumstances such as the one posed by COVID-19.

III. BACKGROUND

7. The factual background to this application is complex and the situation in schools is rapidly changing. The background facts below are intended to provide the context for this application which illustrate generally the nature of the difference and its concerns. It is, of course, not a complete account of the relevant events leading to the pressing labour dispute underlying this application.

8. In March 2020, the Provincial Government joined authorities around the world in implementing measures to reduce the spread of COVID-19. This included shutting the public schools and switching to a remote learning model. In the weeks that followed, as the Government mobilized and reacted, the labour relations dynamic changed in the public education sector.

9. BCPSEA, the bargaining agent for the school districts which provides labour relations advice and interprets the Collective Agreement for employers, has shared responsibilities with the government on issues of COVID-19 as it affected teachers, with Government directly setting guidelines and issuing directions to districts on health and safety measures.

10. For example, on March 4, 2020, BCPSEA [issued a bulletin](#)¹ in which it gave relatively standard sick leave advice, and indicated that if the outbreak continued they would be liaising with a number of branches of government including PSEC and the Ministry of Education.

11. On March 18, 2020, [BCPSEA issued a bulletin](#)² to districts the closure of schools, due to the provincial state of emergency. By way of this communication, BCPSEA also indicated that it was working within a coordinated government framework which includes PSEC and the Ministry of Education.

12. On April 2, 2020 [BCPSEA issued a bulletin](#)³ which announced the suspension of grievance timelines and again mentioned the involvement of PSEC and the Ministry of Education in labour relations matters.

13. This shift is significant because it impacts the rights and avenues available for BCTF to address its concerns about the measures and resources which are provided to Districts, but to be used at the direction of Government.

IV. THE COVID-19 RESPONSE

14. In early May, 2020, the Government of BC released its [Go Forward Plan](#)⁴ which set out key measures which it would take in the public education sector to mitigate COVID-19 risk.

- Routine daily screening for all staff and students
- Routine and frequent environmental cleaning
- Implement a range of options to reduce transmission including smaller class sizes;
- Explicit policy for children, youth and staff who have the symptoms of a cold, flu, or COVID-19 with coughing or sneezing not coming into school.
- increased use of remote online learning, especially for high school children.

¹<https://bcpsea.bc.ca/wp-content/uploads/2020/03/2020-03-COVID-19-Novel-Coronavirus-Issues-and-Resources.pdf>

²<https://bcpsea.bc.ca/wp-content/uploads/2020/03/2020-04-COVID-19-Issues-and-Resources.pdf>

³<https://bcpsea.bc.ca/wp-content/uploads/2020/04/2020-05-COVID-19-Issues-and-Resources.pdf>

⁴https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/bc_covid-19_go-forward_management_strategy_web.pdf

15. This was encouraging and, as the school year drew to a close, the BCTF anticipated cooperating with Ministry of Education and through a process of meaningful consultation, the establishment of a restart plan with strong protections for students and staff. The BCTF provided Government with a document, COVID-19 Pandemic Planning Steering Committee, June 11, 2020, to provide a template for the planning process discussions.

16. The BCTF cooperated and its members participated. Unfortunately, it soon became clear the plan to restart and reopen schools was proceeding in a rushed way with many unanswered questions.

17. On July 29, 2020, the Ministry released [a news release](#)⁵

The ministry is developing operational guidelines that will further assist school districts and independent schools with their planning for September. An education steering committee including teachers, parents, Indigenous rightsholders, support staff, principals and vice-principals, school trustees and the public health sector has also been established to identify best practices and find solutions to potential issues.

18. Despite the work involvement of the BCTF in cooperation with the Ministry in discussing the return to school in September, the July 29, 2020 was a shock to the BCTF as students would all return to school at the start of the year as part of stage 2.

V. TEACHERS' CONCERNS

19. Throughout August, the BCTF came to realize that the Government was not engaging in a genuine consultation. Recommendations of the BCTF were not genuinely considered and very few were adopted as Policy. When they were, they were not properly implemented. This has resulted in significant concerns among teachers. The concerns relate to serious health and safety issues and workload issues. The following are examples of some of the BCTF concerns.

⁵https://archive.news.gov.bc.ca/releases/news_releases_2017-2021/2020EDUC0040-001415.htm#:~:text=Plan%20to%20safely%20bring%20K%2D12%20students%20back%20to%20class%20full%20time&text=VICTORIA%20%E2%80%93%20Enhanced%20safety%20measures%20and,B.C.'s%20Education%20Restart%20Plan.

A. Insufficient remote learning opportunities

20. Because of the timelines set by the Ministry of Education for Districts to submit restart plans, the manner in which the Districts intend to deliver options such as remote learning were not explored or developed with the teachers expected to provide those services.

21. The Provincial Government provided approximately \$45.6 million in additional funding to Districts for targeted measures such as hiring additional custodial staff, additional cleaning and purchasing Personal Protective Equipment. However, when the federal government provided an [additional \\$242 million, and forwarded the first installment of \\$141 million](#)⁶ in early September, the Ministry did not direct that Districts should involve the BCTF in discussions.

22. Despite the need for remote learning options and less students in classrooms to reduce density. These necessary components of restart plans directly impact teachers, by either increasing the overall job duties and workload expected of each classroom teacher or requiring the hiring of additional teachers in every District.

B. Insufficient resources for preventative measures

23. The BCTF is troubled that many districts have not allocated the necessary financial, personnel, and administrative resources to implement the restart strategies and necessary preventative measures to increase school and classroom safety. The funds allocated by the provincial and federal governments have not been distributed as intended and there has been limited discussion or discussion with the local unions.

24. There has been a lack of direction from the Ministry on the expectations for targeting of these funds. This has resulted in some school districts failing to allocate adequate staff to remote learning options to meet the high demand of students, install the recommend MERV filters for

⁶ <http://www.bced.gov.bc.ca/bulletin/20200904/federal-funding-allocations.pdf>

ventilations systems, install barriers in areas where social distancing is not possible or provide alcohol based hand sanitizer.

C. Failure to reduce student density

25. The Ministry of Education has promoted a cohort model as a means to reduce the transmission of COVID-19. However, the cohort model is essentially a contact tracing strategy and cannot be a substitute for other safety measures such as remote learning options for parents and students who may have significant medical issues or are extremely concerned about school safety, nor can it be substitute for physical distancing, a robust mask policy, and sufficient PPE. Indeed, the CDC has indicated that the cohort model is primarily designed to facilitate contact tracing and is not intended to be a safety measure for individual teachers or students.

D. Confusing directions for students and staff with COVID-19 symptoms

26. In addition to the failure to act or implement sufficient protective measures, the Ministry has also removed some measures without any significant discussion with stakeholders. The BCCDC changed its COVID-19 Public Health Guidance for K-12 School Setting document on September 11, 2020.

27. There were a number of changes including the daily health check, which is to be used by teachers and students to determine whether they are well enough to attend school. The changes caused significant confusion in the Districts did not know which document they were to follow, the one from the BCCDC or the Ministry of Education's guidelines document. As a result, some Districts sent home a checklist on Friday that included 16 COVID-19 symptoms, and another on Monday that included seven COVID-19 symptoms.

28. Instead of requiring staff and students to stay home when they exhibited any COVID-19 symptoms to a health care provider, Districts are now told to only require students and staff to stay at home for 24 hours and only for some of the symptoms. If they have other COVID-19 symptoms they can stay at school.

29. Given the potential for increased risk to its members arising from having the Ministry of Education allowing sick students and staff to attend school, the BCTF would have expected to have a meaningful discussion with Government about such changes prior to their implementation. Other changes to the BCCDC document included changing the definition of physical distancing from 2 meters to 1-2 meters. This is a significant change in what the public broadly understands physical distancing to mean that will have a significant impact on schools.

30. BCTF would have expected to have a meaningful discussion with Government about such changes prior to their implementation. This is particularly so given that the medical checklist and a number of other changes only apply to schools in BC and not to other services or sectors. Instead the document was released on Friday, September 11, 2020 with no explanation of the changes.

E. Reducing self assessment requirement

31. Similarly, the Ministry of Education changed the requirements for administrators to ensure that parents are not bringing children to school with COVID-19 symptoms. The July guidelines, which set out what administrators must do, are now replaced by what parents should do.

VI. TEACHER FRUSTRATION

32. On September 14, 2020, the [BCFT wrote to the Minister of Education](#).⁷

However, anxiety, fear, and stress now significantly outweigh the excitement because of needless uncertainties and inconsistencies created by your Ministry’s lack of clear direction on fundamental health and safety issues and on equity of learning opportunities.

Because your Ministry failed to issue clear directives, crucial decisions have been left to the discretion of school districts. As a result, we see vastly different policies and practices across the province, resulting in significant inequities for students and staff. This is causing confusion, stress, and a downward slide in working and learning conditions.

Today the BCTF is demanding that you immediately rectify these disparities by enforcing consistent measures across the province as follows:

⁷ <https://bctf.ca/NewsReleases.aspx?id=57994>

- direct all school districts to provide every BCTF member a face shield.
- direct all school districts to offer a remote learning option that is available to all students.
- direct all school districts to provide dedicated staffing for remote option learning programs, rather than adding this work to the existing workload of classroom teachers.

33. The BCTF has now been forced to adopt a reactive position in which it is using its resources to respond to only the most flagrant examples of health and safety breaches. Teachers are becoming more worried about the risks to their health and that of the students in their school. Teachers are becoming frustrated that important decisions impacting how their risk of infection, workload and job satisfaction are being made without any real input from them.

34. Lack of confidence in the safety of schools may result in widespread refusals of unsafe work on an individual, school wide, or broader basis. In order to prevent this, the public education system must have practices in place which ensure safety and processes for addressing urgent concerns and ensuring understanding of enforcement mechanisms.

VII. THE BOARD’S JURISDICTION UNDER S. 88

35. The *Labour Relations Code* provides an avenue to address this situation expeditiously. The Board, entrusted with the administration of the *Code*, is uniquely situated as an impartial adjudicative tribunal to assist and to avoid labour unrest in the education sector.

36. The Board enjoys the confidence of the parties and public, has the administrative capacity to address this issue, and the competence to understand the complex balancing of collective and individual rights at stake in this application.

37. The Board has been given considerable discretion under the *Labour Relations Code* to resolve disputes that are not adequately addressed through the grievance process which is routinely available.

88. If a difference arises during the term of a collective agreement, and in the board's opinion delay has occurred in settling it or it is a source of industrial unrest between the parties, the board may, on application by either party to the difference, or on its own motion,

- (a) inquire into the difference and make recommendations for settlement, and
- (b) if the difference is arbitrable, order that it be immediately submitted to a specified stage or step in the grievance procedure under the collective agreement or, whether or not the difference is arbitrable, request the minister to appoint a special officer.

VIII. THE PARTIES

38. The *Code* permits the Board to exercise its discretion to inquire into differences, not just grievances, which occur in the workplace in order to meet the purposes of section 2 of the *Code*. The BCTF’s position is that under the present circumstances, it would assist the Board to involve the Provincial Government in its inquiry into the issues raised by the BCTF in this application.

39. The BCTF’s concern is the manner in which the Government has developed and applied health and educational policy which has a direct impact on the learning and working conditions of the school. We emphasize that section 88 does not require that the Board restrict its inquiry to only the parties to a collective agreement.

40. While the degree of Government involvement in all aspects of the COVID-19 response makes it evident why the Government, through the Ministry of Education, must be party to any dispute resolution process arising from this application, the Board has the authority to treat the Government as employer for labour relations purposes such as this.

41. In any event for the purposes of this application, the BCTF says that the government is acting as employer which permits the Board to require them to be a party if necessary pursuant to s. 38 of the *Labour Relations Code*:

38. If in the board's opinion associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this *Code* and grant such relief, by way of declaration or otherwise, as the board considers appropriate.

IX. THE DIFFERENCE

42. The policies of the Ministry of Education are implemented by the employers of teachers, the Districts, to which the collective agreement applies. The Districts have collective agreement and statutory obligations to keep teachers safe at work, including under the *Workers Compensation Act*.

43. Ultimately, Government policy, when implemented at the District level, becomes subject to the grievance and arbitration process when it effects teachers’ collective agreement and other legal rights. The differences caused by the Government’s directions in response to the COVID-19 crisis are labour relations differences.

44. In addition, the actions of the Provincial Government infringe on rights that are protected under the *Charter of Rights and Freedom*, including the security of the person under s.7 of the Charter and the freedom of association under s. 2(d).

45. Under s. 2(d), Government has an obligation to consult with workers over their terms and conditions of work, given the importance of the those working conditions to their self fulfilment, dignity and health and safety.

82 The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work (see Alberta Reference, at p. 368, and Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, at para. 93). As explained by P. C. Weiler in *Reconcilable Differences* (1980):

Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect dignity of the worker in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them [p. 33]

Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391, 2007 SCC 27

X. COVID-19 CONCERNS ARE A SOURCE OF INDUSTRIAL UNREST

46. The second component justifying Board action under s. 88 of the *Code* is that the difference is causing industrial unrest or there has been delay in dealing with the difference. Applying a purposive interpretation to delay and unrest, the conditions for the Board to become involved in the present difference are met when the Board considers the implications of allowing the difference to fester in the coming weeks.

47. There may be unrest in the form of many teachers individually exercising their rights to refuse to perform unsafe work or there may be unrest in the form of a tsunami of grievances which challenge the manner in which Districts have implemented Ministry of Education Policy. These concerns were publicly expressed by BCTF president Teri Mooring in an interview with the media shortly before the start of the school year.

48. Delay and unrest are relative terms. A months long period during protracted collective bargaining may not be significant while a delay of a week during an outbreak of infectious disease can be fatal. The BCTF is continuing to voice its concerns in an effort to avoid risks to health and safety that are likely consequences of the failure to take proper preventative measures.

49. Further, if teachers are in a situation where the lives and health of themselves and students are unnecessarily risked, this could lead to a significant number of grievances and other legal actions by the BCTF. Some groups of teachers may consider job action.

50. The Board has the jurisdiction to become involved in differences where delay has occurred or there is a source of industrial unrest under s. 88 and must be guided by the principles of the *Labour Relations Code*.

2.(1) The following are the purposes of this Code:

- (a) to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees;
- (b) to encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity;

(c) to minimize the effects of labour disputes on persons who are not involved in the dispute;

(d) to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;

(e) to ensure that the public interest is protected during labour disputes;

(f) to encourage the use of mediation as a dispute resolution mechanism.

(2) The board shall exercise the powers and perform the duties conferred or imposed on it under this Code having regard to the purposes set out in subsection (1).

XI. THE BOARD'S INQUIRY INTO THE COVID-19 EDUCATION SECTOR RESPONSE

51. The BCTF requests that the Board investigate the difference and make recommendations to resolve it. While the BCTF has identified a number of significant issues which require immediate attention, this is not an exhaustive list.

52. The BCTF believes that that the parties need to have an agreed understanding as to how the education system responds to COVID-19 through a transparent and accountable framework. The BCTF suggest that a robust process for developing, implementing, supporting, and evaluating risk reduction and accommodative measures is crucial and is more likely to avoid future differences than simply addressing the specific measures identified this far.

53. The key elements of the COVID-19 response process, which the BCTF suggests the Board should examine in detail are as follows:

- i. Consultation and Policy Development
- ii. Communication and Implementation of Measures
- iii. Providing Resources to Introduce and Maintain Changes
- iv. Evaluation and Enforcement of Measures and Policies

XII. CONCLUSION

54. The BCTF, on behalf of teachers and the educational stakeholders in the province, requests that Board assist the parties on an expedited basis to resolve these urgent concerns and prevent labour unrest.